

CHAPTER 24:05:30

PROCEDURAL SAFEGUARDS

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24:05:30:02.01. Parent participation in meetings. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a free appropriate public education to the child. Each school district shall provide notice consistent with § 24:05:25:16 to ensure that parents of eligible students be given the opportunity to participate in the meetings described in this article. If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the district shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. A placement decision may be made by a group without parental involvement, if the district is unable to obtain the parent's participation in the decision. The district must have a record of its attempts to ensure parental involvement, ~~including information consistent with § 24:05:25:17. The district shall make reasonable efforts to ensure that the parents understand, and are able to participate in, any group discussions relating to the educational placement of their child, including arranging for an interpreter for parents with deafness or whose native language is other than English.~~

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:02.02. Meetings defined. For the purposes of § 24:05:30:02.01, a meeting does not include informal or unscheduled conversations involving school district personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of services provision ~~if those issues are not addressed in the child's individualized education program.~~ In addition, a meeting does not include preparatory activities that school district personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:03. Independent educational evaluation. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the district subject to the conditions in this section.

Each district shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the ~~agency~~ district criteria applicable for independent educational evaluations specified in this section.

If a parent requests an independent educational evaluation, the district may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the district may not unreasonably delay either providing the independent educational evaluation at public expense or ~~initiating~~ filing a due process complaint to request a due process hearing to defend the public evaluation.

If the parent requests an independent educational evaluation at public expense, the district must, without unnecessary delay, either ~~initiate~~ file a due process complaint to request a hearing under this chapter to show that its evaluation is appropriate, or ensure that an independent educational evaluation is provided at public expense unless the district demonstrates in a hearing that the evaluation obtained by the parent did not meet district criteria. If the district ~~initiates~~ files a due process complaint to request a hearing under this chapter and the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

A parent is entitled to only one independent educational evaluation at public expense each time the district conducts an evaluation with which the parent disagrees.

If the parent obtains an independent educational evaluation at public expense or shares with the district an evaluation obtained at private expense, the results of the evaluation must be considered by the district, if it meets district criteria, in any decision made with respect to the provision of a free appropriate public education to the child and may be presented by any party as evidence at a hearing under this chapter regarding that child.

If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense. If an independent evaluation is made at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the district uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Each district shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

For the purposes of this section ~~"independent education evaluation"~~, the term, independent education evaluation, means an evaluation conducted by a qualified examiner who is not employed by the district responsible for the education of the child in question. ~~"Public expense"~~ For purposes of this section, the term public expense, means that the district either pays for the full cost of the evaluation or ensures that the evaluation

is otherwise provided at no cost to the parent consistent with §§ 24:05:14:01 to 24:05:14:01.05, inclusive.

Except for the criteria described in this section, a district may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:04. Prior notice and ~~parent consent.~~ Written notice which meets the requirements of § 24:05:30:05 must be given to the parents five days before the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. The five-day notice requirement may be waived by the parents. ~~If the notice described in this section relates to an action proposed by the district that also requires parental consent, the district may give notice at the same time it requests parent consent.~~

~~Informed parental consent must be obtained before conducting a first time evaluation, reevaluation, and before initial placement of a child in a program providing special education or special education and related services. Parental consent is not required before:~~

- ~~(1) Reviewing existing data as part of an evaluation or reevaluation; or~~
- ~~(2) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.~~

~~A district may not use a parent's refusal to consent to one service or activity under this article to deny the parent or child any other service, benefit, or activity of the district except as required by this chapter.~~

~~If a parent refuses to give consent for the child to be evaluated or reevaluated, the district may use the hearing or mediation procedures in this article to determine whether the child may be evaluated without parental consent.~~

~~If the hearing officer upholds the district, the district may evaluate or reevaluate the child without parental consent, subject to the parent's right to appeal the decision to the courts.~~

Source: 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 28 SDR 105, effective January 31, 2002.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:05. Content of notice. The notice must include the following:

(1) A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of any other options the ~~district~~ IEP team considered and the reasons why those options were rejected;

(2) A description of each evaluation procedure, assessment, ~~test~~, record, or report that the district uses as a basis for the proposal or refusal;

(3) A description of any other factors which are relevant to the district's proposal or refusal;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this article and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this article.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:06. Form of notice. The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, ~~the division or~~ the local education agency shall take steps to ensure that the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, that the parent understands the content of the notice, and that there is written evidence that the requirements in this section have been met.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:06.01. Procedural safeguards notice -- Availability. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, ~~one time per year. A~~ only one time a school year, except that a copy must also be given to the ~~parents~~ parent:

- (1) Upon initial referral or parent request for evaluation;
- (2) Upon request by a parent;
- (3) In accordance with the discipline procedures in chapters 24:05:06 and 24:05:06.01; and
- ~~(3) (4) Upon the first occurrence of the filing of a request for a due process hearing under this chapter~~ receipt of the first state complaint under chapter 24:05:15 and first due process complaint under this chapter in a school year.

A district may place a current copy of the procedural safeguards notice on its internet website if a website exists.

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:06.02. Procedural safeguards notice -- Contents. The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under this article and the state complaint procedures relating to:

- (1) Independent educational evaluation;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to educational records;
- (5) Opportunity to present complaints to initiate due process hearings and resolve complaints through the due process complaint and state complaint procedures, including:
 - (a) The time period in which to file a complaint;
 - (b) The opportunity for the district to resolve the complaint; and
 - (c) The difference between the due process complaint and the state complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- (6) The child's placement during pendency of any due process proceedings complaint;
- (7) Procedures for students who are subject to placement in an interim alternative educational setting;
- (8) Requirements for unilateral placement by parents of children in private schools at public expense;
- (9) ~~Mediation~~ The availability of mediation;
- (10) ~~Due process hearings~~ Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- (11) Civil actions, including the time period in which to file those actions; and
- (12) Attorneys' fees; and
- (13) ~~The state complaint procedures under chapter 24:05:15, including a description of how to file a complaint and the timelines under these procedures.~~

The form of the notice must be consistent with § 24:05:30:06, including written evidence that the requirements in this section have been met.

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:06.03. Electronic mail. A parent of a child with a disability may elect to receive notices required by this chapter by an electronic mail communication, if the district makes that option available.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:07. Impartial due process hearing. ~~The school district superintendent, chief administering officer, or a parent upon notice to the school district superintendent or chief administering officer may initiate a hearing on the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.~~

~~The school district shall immediately notify the Division of Education Services and Resources, Office of Special Education, when a hearing is initiated.~~

~~The division shall immediately notify the parents of the availability of mediation described in this chapter.~~

~~The state director of special education shall appoint an impartial due process hearing officer to conduct the hearing. Either party may request a one-time change in the hearing officer appointed to hear the case. The request must be in writing and submitted to the state director of special education within five working days after receipt of notice of the initial appointment~~ Repealed.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:07.01. Filing a due process complaint. A parent or a school district may file a due process complaint on any matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:07.02. Timeline for filing a due process complaint. A due process complaint shall allege a violation that occurred not more than two years before the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the district that it had resolved the problem forming the basis of the due process complaint; or

(2) The district's withholding of information from the parent that was required under this chapter to be provided to the parent.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08. Free or low-cost services to parent. ~~The state director of special education~~ school district shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent or school district files a due process complaint initiates a hearing under this chapter or the parent requests the information.

Source: 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.01. ~~Parent notice to school district~~ Due process complaint notice. ~~A school district must have procedures that require either party the parent of a child with a disability or the attorney representing a party the child, to provide to the other party notice a due process complaint, which must remain confidential to the district in a request for a due process hearing under this chapter. The party filing a due process complaint shall forward a copy to the department.~~

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.02. Content of due process complaint parent notice. The notice required in § 24:05:30:08.01 must include:

- (1) The name of the child;
- (2) The address of the residence of the child;
- (3) The name of the school the child is attending;

(4) In the case of a homeless child or youth, available contact information for the child, and the name of the school the child is attending;

(4) (5) A description of the nature of the problem of the child relating to the proposed initiation or change, including facts relating to the problem; and

(5) (6) A proposed resolution of the problem to the extent known and available to the parents party at the time. The division shall develop a model form to assist parents in filing a request for a due process hearing that includes the information required in this section.

A school district may not deny or delay a parent's right to a due process hearing for failure to provide the notice required in this section.

A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this section.

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.03. Sufficiency of complaint. The due process complaint required by this chapter is deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in § 24:05:30:08.02.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.04. Decision on sufficiency of complaint. Within five days of receipt of the notification under § 24:05:30:08.03, the hearing officer shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of § 24:05:30:08.02 and shall immediately notify the parties in writing of that determination.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.05. Amendment to due process complaint. A party may amend its due process complaint only if:

(1) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a resolution meeting held under § 24:05:30:08.09; or

(2) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

If a party files an amended due process complaint, the timelines for the resolution meeting and the time period for resolving the complaint begin again with the filing of the amended due process complaint.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.06. District response to due process complaint. If the district has not sent a prior written notice under this chapter to the parent regarding the subject matter contained in the parent's due process complaint, the district shall, within 10 days of receiving the due process complaint, send to the parent a response that includes:

(1) An explanation of why the district proposed or refused to take the action raised in the due process complaint;

(2) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, assessment, record, or report the district used as the basis for the proposed or refused action; and

(4) A description of the other factors that are relevant to the district's proposed or refused action.

A response by the district under this section does not preclude the district from asserting that the parent's due process complaint was insufficient, if appropriate.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.07. Other party response to due process complaint. Except as provided in § 24:05:30:08.06, the party receiving a due process complaint shall, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.08. Model forms. The department shall develop model forms to assist parents and school districts in filing a due process complaint in accordance with this chapter and a state complaint under chapter 24:05:15. However, the department or a school district may not require the use of the model forms.

Parents, school districts, and other parties may use the appropriate model forms described in this section, or another form or other document, if the form or document that is used meets, as appropriate, the content requirements in § 24:05:30:08.02 for filing a due process complaint, or the requirements in chapter 24:05:15 for filing a state complaint.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.09. Resolution meeting -- Participants. Within 15 days of receiving notice of the parent's due process complaint, and before the initiation of a due process hearing under this chapter, the district shall convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process complaint. The meeting:

(1) Shall include a representative of the district who has decision-making authority on behalf of the district; and

(2) May not include an attorney of the district unless the parent is accompanied by an attorney.

The parent and district shall determine the relevant members of the IEP team to attend the meeting.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.10. Resolution meeting -- Purpose. The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the district has the opportunity to resolve the dispute that is the basis for the due process complaint.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.11. Resolution meeting -- Waive or mediate. The resolution meeting need not be held if:

- (1) The parent and the district agree in writing to waive the meeting; or
- (2) The parent and the district agree to use the mediation process described in this chapter.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.12. Resolution period – General. If the district has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

Except as provided in § 24:05:30:08.14, the timeline for issuing a final decision in a due process hearing begins at the expiration of the 30-day period.

Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding the above two paragraphs, the failure of the parent filing a due process complaint to participate in the resolution meeting delays the timelines for the resolution process and due process hearing until the meeting is held.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.13. Dismissal of complaint or initiation of hearing. If the district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in § 24:05:25:17, the district may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

If the district fails to hold the resolution meeting specified in § 24:05:30:08.09 within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.14. Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing described in this chapter starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or
- (3) If, after both parties agree in writing to continue the mediation at the end of the 30-day resolution period, the parent or district withdraws from the mediation process.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:08.15 Written settlement agreement. If a resolution to the dispute is reached at the meeting described in § 24:05:30:08.09 and § 24:05:30:08.10, the parties shall execute a legally binding agreement that is:

- (1) Signed by both the parent and a representative of the district who has the authority to bind the district; and
- (2) Enforceable in any state court of competent jurisdiction or in a district court of the United States.

If the parties execute an agreement pursuant to this section, a party may void the agreement within three business days of the agreement's execution.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09. Mediation. ~~Within five working days after receipt from a local school district superintendent or chief administering officer of a written request for a hearing pursuant to this chapter the state director of special education may initiate steps to conduct a mediation conference. Either party may waive the mediation conference.~~ Each school district shall ensure that procedures are established and implemented to allow parties to disputes involving any matter under this article, including matters arising before the filing of a due process complaint, to resolve disputes through a mediation process. Procedures for mediation are as follows:

- (1) The ~~state director of special education~~ district shall ensure that mediation is viewed as voluntary and freely agreed to by both parties and is in no way used to deny or delay an aggrieved party's right to a hearing on a parent's due process complaint, or to deny any other rights afforded under this article; and

(2) The mediation conference is an intervening, informal process conducted in a nonadversarial atmosphere that is scheduled in a timely manner and held in a location that is convenient to the parties in the dispute; .

~~(3) The mediation must be completed within 15 calendar days after receipt by the state director of special education of the request for the hearing;~~

~~(4) Either party to the mediation conference may request the hearing officer to grant a continuance. Such a continuance shall be granted upon a showing of good cause. A continuance may not extend the 45 calendar day maximum for completion of the due process hearing and rendering of the final administrative decision unless the party initiating the request for the hearing is agreeable to such an extension;~~

~~(5) The mediation resolution may not conflict with state or federal law and must be to the satisfaction of both parties. Satisfaction shall be indicated by the signatures of both parties on the written resolution;~~

~~(6) A copy of the written resolution shall be mailed by the mediator to each party within 5 calendar days following the mediation conference. A copy shall also be filed by the mediator with the state director of special education;~~

~~(7) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings. The parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the process; and~~

~~(8) Mediation, at a minimum, must be available whenever a hearing is requested under this chapter or chapters 24:05:26 and 24:05:26.01.~~

The state shall bear the cost of the mediation process, including the costs of meetings described in § 24:05:30:09.02.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.01. Mediator -- Qualified and impartial. The mediation process shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The ~~division~~ department shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Mediators shall be selected on a random, rotational, or other impartial basis ~~from the list~~. An individual who serves as a mediator:

(1) May not be an employee of:

(a) Any school district or state agency that is involved in the education or care of the child; or

(b) The ~~division~~ department, if the ~~division~~ department is providing direct services to a child who is the subject of the mediation process; and

(2) May not have a personal or professional interest that conflicts with the person's objectivity ~~conflict of interest~~.

A person who otherwise qualifies as a mediator is not an employee of a district or state agency solely because the person is paid by the ~~division~~ department to serve as a mediator.

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.02. Meeting to encourage mediation. A school district may establish procedures to ~~require~~ offer to parents and schools who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party:

(1) Who is under contract with a parent training and information center or community parent resource center in the state, or an appropriate alternative dispute resolution entity; and

(2) Who would explain the benefits of the mediation process and encourage the parents to use the process.

~~A school district may not deny or delay a parent's right to a due process hearing under this chapter if the parent fails to participate in the meeting described in this section.~~

Source: 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.03. Mediation agreement. If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

(1) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court; and

(2) Is signed by both the parent and a representative of the district who has the authority to bind the district.

A written, signed mediation agreement under this section is enforceable in any state court of competent jurisdiction or in a district court of the United States.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.04. Impartial due process hearing. If a due process complaint is received under this chapter, chapter 24:05:26, or chapter 24:05:26.01, the parents or the district involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in this article.

The department is responsible for ensuring that a due process hearing is held.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.05. Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under this chapter, unless the other party agrees otherwise.

A parent may file a separate due process complaint on an issue separate from a due process complaint already filed.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:09.06. Timeline for requesting a due process hearing. A parent or district shall request an impartial hearing on their due process complaint within two years of the date the parent or district knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the exceptions in § 24:05:30:07.02 exist.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:10. Impartial hearing officer. A hearing may not be conducted by a person who is an employee of a ~~public agency~~ school district which is involved in the education or care of the child or by any person having a personal or professional ~~or fiscal~~

interest that conflicts with the person's objectivity in the hearing ~~which would create a conflict of interest.~~

A hearing officer shall:

(1) Possess knowledge of, and the ability to understand, the provisions of IDEA, federal and state regulations pertaining to IDEA, and legal interpretations of IDEA by federal and state courts;

(2) Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(3) Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

An individual who otherwise qualifies to conduct a hearing is not an employee of the ~~agency~~ department solely because the individual is paid by the ~~agency~~ department to serve as a hearing officer.

Each ~~public-agency~~ school district shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:10.01. Decision of hearing officer. Subject to the provisions of this section, a hearing officer's determination of whether a child received FAPE shall be based on substantive grounds.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(1) Impeded the child's right to a FAPE;

(2) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(3) Caused a deprivation of educational benefit.

Nothing in this section precludes a hearing officer from ordering a district to comply with procedural requirements under this chapter, chapter 24:05:26, and chapter 24:05:26.01.

Source:

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:11. Appeal of hearing decision -- Civil action. Any party aggrieved by the decision of the hearing officer under this chapter or chapters 24:05:26 and 24:05:26.01 may bring a civil action with respect to a due process complaint notice requesting a due process hearing under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2). A civil action may be filed in either state or federal court without regard to the amount in controversy. The party bringing the action has 90 days from the date of a hearing officer's decision to file a civil action. In any action brought under this section, the court:

- (1) Shall review the records of the administrative proceedings;
- (2) Shall hear additional evidence at the request of a party; and
- (3) Basing its ~~decisions~~ decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

Nothing in Part B of the Individuals with Disabilities Education Act restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 as amended to January 1, 2007, Title V of the Rehabilitation Act of 1973 as amended to January 1, 2007, or other federal laws protecting the rights of children with disabilities, ~~except that.~~ However, before the filing of a civil action under these laws, seeking relief that is also available under section 615 of IDEA, the procedures under this chapter for filing a due process complaint hearing must be exhausted to the same extent as would be required had the action been brought under section 615 of IDEA.

Source: 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:11.01. Reasonable attorneys' fees. In any action or proceeding brought under 20 U.S.C. § 1415(e), the court, in its discretion, may award reasonable attorneys' fees under 20 U.S.C. § 1415(i)(3) as in effect on December 3, 2004 ~~June 4, 1997~~, as part of the cost to ~~the parent or guardian who is the prevailing party.~~ Each public agency shall inform parents of the provisions for attorneys' fees the prevailing party who is the parent of a child with a disability; to the prevailing party who is the state or district against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or to the prevailing party who is the state or district against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Funds under Part B of the Individuals with Disabilities Education Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under

section 615 of the IDEA and this chapter. This does not preclude a district from using IDEA, Part B funds for conducting an action or proceeding under section 615 of IDEA.

A court ~~awards~~ shall award reasonable attorneys' fees under section 615(i)(3) of the IDEA consistent with the following:

(1) Fees awarded under section 615(i)(3) of the IDEA must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this section;

(2) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the IDEA for services performed subsequent to the time of a written offer of settlement to a parent if:

(a) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure (1987) or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(b) The offer is not accepted within 10 days; and

(c) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement;

(3) Attorneys' fees may not be awarded relating to any meeting of the ~~placement committee~~ IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the ~~division~~ department for a mediation described in this chapter ~~that is conducted before the filing of a request for due process under this chapter. A resolution meeting conducted pursuant to this chapter is not considered a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for purposes of this section;~~

(4) An award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer;

(5) The court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the IDEA, if the court finds that:

(a) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(b) The amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(c) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(d) The attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with this chapter.

(6) The provisions of subdivision (5) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the IDEA.

Source: 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:12. Hearing rights. Any party to a hearing, under this chapter or chapters 24:05:26 and 24:05:26.01, has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training concerning the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written or, at the option of the parents, electronic verbatim record of the hearing; and

(5) Obtain written or, at the option of the parents, electronic findings of fact and decisions. The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the state advisory counsel and shall make those findings and decisions available to the public.

Parents involved in hearings must be given the right to have the child who is the subject of the hearing present and open the hearing to the public. The record of the hearing and the findings of fact and decisions must be provided at no cost to the parents.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:13. Time limit for and convenience of hearings. The ~~division~~ department shall ensure that not later than 45 calendar days after the ~~receipt of a request for a hearing~~ expiration of the 30 day period under § 24:05:30:08.12 or adjusted time period described in § 24:05:30:08.14, a final decision is reached on the hearing and a copy of the decision is mailed to each of the parties. A hearing officer may grant specific extensions of time beyond the periods set out in this section ~~45-day time limit~~ at the request of either party. Each hearing must be conducted at a time and place which is reasonably convenient to the parents and child involved.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:14. Child's status during proceedings. Except as provided in chapters 24:05:26 and 24:05:26.01, during the pendency of any administrative hearing or judicial proceeding regarding a due process complaint notice requesting a due process hearing pursuant to this chapter, the child involved must remain in the present educational placement unless the state or school district and the parents agree otherwise. If the complaint hearing involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

If the complaint involves an application for initial services under this article from a child who is transitioning from Part C of the IDEA to Part B and is no longer eligible for Part C services because the child has turned three, the district is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, then the district must provide those special education and related services that are not in dispute between the parent and the district.

If the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between ~~a school district or state agency~~ the state and the parents for purposes of pendency.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:15. Surrogate parents. Each school district shall establish procedures for the assignment of a surrogate parent to ensure that the rights of a child are protected if no parent, as defined in 24:05:13.01, can be identified and the district, after reasonable effort, cannot locate ~~discover the whereabouts of~~ a parent or if the child is a ward of the

state or the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act, as amended to January 1, 2007. ~~At a minimum, a~~ A district's method for determining whether a child needs a surrogate parent must include the following:

(1) The identification of staff members at the district or building level responsible for referring students in need of a surrogate parent;

(2) The provision of in-service training on the criteria in this section for determining whether a child needs a surrogate parent; and

(3) The establishment of a referral system within the district for the appointment of a surrogate parent.

If a child is a ward of the state, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, if the surrogate meets the requirements of this section.

The district superintendent or designee shall appoint surrogate parents.

The district shall ensure that a person selected as a surrogate has no personal or professional interest that conflicts with the interest of the child the surrogate represents and has knowledge and skills that ensure adequate representation of the child. The district is responsible for the training and certification of surrogate parents and shall maintain a list of persons who may serve as surrogate parents.

~~A district may select as a surrogate a person who is an employee of a nonpublic agency that only provides noneducational care for the child and who meets the conflict of interest and knowledge standards in this section.~~

A person assigned as a surrogate may not be an employee of the department, district, or any other agency ~~a public agency~~ that is involved in the education or care of the child.

If a child is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents, without regard to the nonemployee provision above, until a surrogate parent can be appointed who meets all of the requirements of this section.

A person who otherwise qualifies to be a surrogate under the provisions of this section is not an employee of the agency solely because the person is paid by the agency to serve as a surrogate parent.

The surrogate parent may represent the student in all matters relating to the identification, evaluation, educational placement, and provision of FAPE to the students.

The department shall make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a district determines that the child needs a surrogate parent.

~~The district superintendent or a designee is responsible for reporting to the placement committee on the performance of the surrogate parent.~~

Source: 16 SDR 68, effective October 15, 1989; 21 SDR 39, effective August 28, 1994; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1, 13-37-2.1 13-37-27.

24:05:30:16. Continuation as surrogate parent. ~~An individual assigned as a surrogate parent shall continue in that capacity as long as the child meets the following conditions:~~

~~(1) Remains eligible for special education or special education and related services;~~

~~(2) Meets the criteria for the appointment of a surrogate parent or unless the person appointed as a surrogate parent fails to represent the best interest of the child; and~~

~~(3) Remains a resident of the placing district.~~

~~Removal of an individual as a surrogate parent shall be accomplished by the district superintendent or designee~~ Repealed.

Source: 16 SDR 68, effective October 15, 1989; 23 SDR 31, effective September 8, 1996.

General Authority: SDCL 13-37-1.1.

Law Implemented: SDCL 13-37-1.1.

24:05:30:17. Consent. ~~"Consent" means that the parents have been fully informed in the native language or another mode of communication of all information relevant to the activity for which consent is sought in the native language or another mode of communication; the parents understand and agree in writing to the carrying out of the activity for which consent is sought; the consent describes that activity and lists any records which will be released and to whom; and the granting of consent by the parents is voluntary and may be revoked in writing at any time. If a parent revokes consent, that revocation is not retroactive (i.e., the revocation does not negate an action that has occurred after the consent was given and before the consent was revoked)~~ Repealed.

Source: 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

General Authority: SDCL 13-37-1.1.

~~Law Implemented:~~ SDCL 13-37-1.1.